United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7646
75-7699

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P/C

United States Court of Appeals

FOR THE SECOND CIRCUIT

75-7699, 76-7011

GEORGE RIOS, *et al.*,

Plaintiffs-Appellees-Appellants,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., *et al.*,

Defendants-Appellants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., *et al.*,

Defendants-Appellants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS, GEORGE RIOS, *ET AL.*

MARILYN R. WALTER
ROBERT P. ROBERTS
National Employment
Law Project, Inc.
423 West 118th Street
New York, New York 10027

TUFO, JOHNSTON & ALLEGAERT
645 Madison Avenue
New York, New York 10022

Attorneys for Plaintiffs-Appellees-Appellants, George Rios, et al.

DENNIS R. YEAGER
Of Counsel

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II. PRELIMINARY STATEMENT

The decision from which this appeal is taken was rendered in the United States District Court for the Southern District of New York by Honorable Dudley B. Bonsal, United States District Judge. The order of the District Court (Appendix at 1033, et seq.[1]) was entered on October 17, 1975 (motion to alter or amend denied on November 21, 1975), pursuant to an opinion (A-1011, et seq.) issued on June 27, 1975. The opinion is reported at 400 F.Supp. 993.

III. STATEMENT OF THE CASE

A. Nature of the Case and the Instant Appeal

This case involves cross appeals from a partial award of attorneys fees in a class action brought by plaintiffs-appellees/cross-appellants George Rios, Eugene Jenkins, Eric Lewis and Wylie Rutledge, on behalf of themselves and other similarly situated minority workers (hereafter "plaintiffs"), to redress employment discrimination in the steamfitting industry in the New York City area. The action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. and other provisions of federal law. Plaintiffs prevailed at trial and a permanent injunction was

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1. Hereafter citations to the Appendix will be in the form "A- ."

subseq ently entered granting relief against the defendants, Enterprise Association Steamfitters Local 638 of the U.A. (hereafter the "Union"), the Mechanical Contractors Association of New York, Inc. (hereafter "MCA"), and the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund (hereafter "JAC") (A-566-68). Plaintiffs moved for costs, disbursements and attorneys fees, as authorized by 42 U.S.C. §2000e-5(k), in the amount of $128,092.50 to recompense attorneys for plaintiffs for a total of 2,449.75 hours worked on the case to that date (A-948, 985). The District Court denied the motion as to MCA and JAC. As to the Union, the District Court granted plaintiffs' motion for costs and disbursements but, although finding the amount of attorneys fees sought by plaintiffs to be otherwise allowable, limited the award to $50,000.00, on grounds which are the subject of this appeal, to be paid by the Union in installments over a two-year period (A-1033-34). The Union has appealed the fee and its amount as well as the award of certain items of costs and disbursements (A-1046-47). Plaintiffs have cross-appealed from the denial of the full amount sought and from the failure to hold defendants MCA and JAC liable for the award (A-1052-53).

B. Prior Proceedings

The action was commenced by a complaint filed in

the United States District Court for the Southern District of New York on February 26, 1971 (A-15, et seq.). In a decision rendered on March 24, 1971 (A-79) (326 F.Supp. 198), Judge Marvin E. Frankel granted a motion by plaintiffs for a preliminary injunction, finding that the Union had "followed a course of racial discrimination over the years," (A-83) and entered an order (A-105) requiring the Union to admit plaintiffs Rios, Jenkins and Lewis as journeyman members. A similar motion by plaintiff Rutledge was denied.

By order entered on August 24, 1971, (54 F.R.D. 234) plaintiffs' motion for an order permitting the case to proceed as a class action was granted by Judge Charles H. Tenney.

Following pre-trial discovery, which included extensive litigation to compel the Union to answer Interrogatories, see 4 E.P.D. ¶7553 (S.D.N.Y. 1972), plaintiffs' action was assigned to Judge Bonsal for all purposes and consolidated for trial with an action brought against the same defendants by the United States (A-165). Trial was held before Judge Bonsal from January 15 through January 26, 1973. On June 21, 1973, Judge Bonsal filed an Opinion (A-580, et seq.), (360 F. Supp. 979) and an Order and Judgment (A-566, et seq.) (6 E.P.D. ¶8716) which permanently enjoined each of the defendants from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin and

required affirmative relief, including a 30% non-white Union membership goal, to correct the effects of past discrimination.

On an appeal from that Order taken by the Union, the relief ordered was affirmed by this Court and remanded to the District Court for the limited purpose of recalculating the appropriate percentage goal for non-white membership in the Union, 501 F.2d 622 (2d Cir. 1974). Following a hearing the District Court found that, absent discrimination, non-whites would have comprised 26% of the A branch membership and the goal was accordingly established at that figure. 400 F.Supp. 983 (S.D.N.Y. 1975). An appeal taken by the Union from an Affirmative Action Plan adopted by the District Court (Index to Record on Appeal, Document 73)[2] was stayed pending the resolution of other issues. A third appeal taken by white non-members of the Union was decided favorably to plaintiffs' position, 520 F.2d 352 (2d Cir. 1975).

Following extensive briefing, the District Court entered an order on costs and attorneys fees on October 17, 1975. Plaintiffs' motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (A-1038-41), was denied by the District Court on November 21, 1975 (A-1045).

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2. Hereafter references to documents not in the Appendix and assigned a document number in the Index to the Record on Appeal will be in the form "Doc. ." References to Exhibits admitted in evidence in the District Court but not in the Appendix will be in the form "Ex. ."

The Union filed a notice of appeal on December 16, 1975 (A-1046-47); plaintiffs cross-appealed on December 22, 1975 (A-1052-53).

An order on back pay entered on October 17, 1975 is also before this Court on appeal (Appeal No. 75-7646).

C. Statement of the Facts

The Union was engaged in a flagrant pattern of racial discrimination in which MCA and the JAC participated. The District Court enjoined the defendants from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the grounds of race, color or national origin (A-566-68).

In affirming the decision of the District Court, this Court stated:

> "The court's findings, which are not contradicted, disclose a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership in the Union's A Branch and maintaining it as a 'white' union."
> Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A., 501 F.2d 622, 631 (2d Cir. 1974)

Attorneys for the plaintiffs devoted a total of 2,449.75 hours to representing the plaintiffs (A-985). Plaintiffs' request for $128,092.50 in attorneys fees, however, was reduced by the District Court to $50,000.00 and no fee was awarded against MCA and JAC.

1. Non-White Access to Membership in the A Branch of the Union

The first non-white was not admitted to the A Branch of the Union[3] until 1967 (A-586-87). In 1970, the year before this action was filed, black and Spanish-surnamed workers constituted less than 1% of the A Branch membership (A-587). At that time, approximately 30% of the population of New York City and Nassau and Suffolk counties was composed of blacks and persons of Spanish language (A-589). Numerous non-whites had been denied admission into the A Branch, notwithstanding extensive efforts by them to obtain membership (e.g., A-137, 188-89; 203, 206, 853, 857). Yet in the twelve months preceding the trial, 156 whites were admitted informally to the A Branch without having completed the apprenticeship program or taken an examination (A-599). The District Court, on the basis of the facts before it, found that the Union had violated Title VII of the Civil Rights Act of 1964 (A-600-01). On the basis of the District Court's finding of discrimination, it permanently enjoined the Union from engaging in any act or practice which had the purpose or effect of discriminating against any

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3. Members of the A Branch have a higher hourly rate of pay than members of the B Branch. Being a member of the A Branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of the Union and is a prerequisite to obtaining job security and preventing early layoffs. Another advantage of A Branch membership is the greater opportunity for advancement and for earning overtime pay (A-588).

individual or class of individuals on the basis of race, color or national origin (A-566-67), and ordered extensive affirmative relief to remedy the effects of past discrimination (A-569-70, 572-75, 576-79).

2. Referral Practices in the Steamfitting Industry

There was no formal method of referring workers for employment in the steamfitting industry in the New York area. Information concerning available employment was circulated informally usually by word-of-mouth among the predominantly white members of the A Branch, (A-592). Being a member of the A Branch, or even being a friend or relative of an A Branch member, gave a worker access to information concerning job availability (A-720) and was a substantial aid in obtaining work as a construction steamfitter (A-159, 588).

The District Court found the referral practices in the industry combined with the history of discrimination in admission to the A Branch to preserve the effects of past discrimination by giving whites an advantage in obtaining employment (A-602-03). Accordingly, the District Court permanently enjoined the defendants from discriminating against any individual or class of individuals in referral to employment and hiring (A-566-568), and ordered the Union and MCA to keep up-to-date records of available work and unemployed non-white steamfitters (A-577, 603).

3. Achieving A Branch Membership Through the Apprenticeship Program

One means of attaining membership in the A Branch of the Union was through the apprenticeship program, but this route was virtually foreclosed to non-whites. Before 1964, all of the apprentices were white (A-594). After 1964, applicants for admission to the program were required to meet a number of formal requirements, which included taking a written examination (A-594). Results of the written examinations given by the JAC from 1964 to the date of trial revealed that, among those tested, 41.37% of the whites passed the test, as compared with 10.37% of the blacks and 11.1% of the Spanish-surnamed applicants (A-594). As a consequence of the written test and the other selection devices utilized by the JAC, 94.3% of the 492 apprentices indentured since 1964 were white, while only 4.67% were black and 1.01% were Spanish-surnamed (A-596).

The District Court found that the apprenticeship program administered by the JAC violated Title VII (A-604) and permanently enjoined the JAC from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin (A-567-68). In addition, pending achievement of the percentage goal of non-whites ordered by the District Court, the admission requirements for the apprenticeship program were altered substantially and non-white percentage goals were established (A-569-71, 575-76).

4. Employment of Non-Whites by Members of MCA

MCA is a trade association which negotiates the terms and conditions of employment in the steamfitting industry on behalf of its members who are steamfitting contractors (A-588-89, 614). MCA members did not employ non-white journeymen until 1966 (A-412), and it was an accepted practice in the industry that MCA members did not employ those who were not members of or given permits by the Union (A-500-01). Government agencies repeatedly and generally unsuccessfully put pressure on MCA and its members to require the contractors to employ non-whites (A-274-76).

Eric Lewis, a fully-qualified steamfitter, sought employment through MCA but was told he could not have a job unless he completed the apprenticeship program (A-290) which was later found to be discriminatory by the District Court (A-604). In fact, less than 25% of the members of the A Branch had been through the apprenticeship program (A-593). He was also told that he would probably not want to join the apprentice program as the wages would be too low for him (A-93, 290).

The District Court permanently enjoined the MCA from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin (A-567) and required MCA to comply with other provisions of the Order and affirmative action plan (A-569, 574, 576; Doc. 73 pp. 7, 9).

IV. ARGUMENT

A. Introduction

Section 706(k) of Title VII specifically provides for an award of attorneys fees:

> "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U.S.C. §2000e-5(k).

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court, referring to Title II of the Civil Rights Act of 1964 (42 U.S.C. §2000a-3(b)), stated:

> ". . . the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances." 422 U.S. at 415. [Citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).]

The Court in Moody then determined that there was an equally strong public interest in having actions brought under Title VII to eradicate discriminatory employment practices, and that this interest could be vindicated by applying the Piggie Park standard to the attorneys fees provision of Title VII. 422 U.S. at 415. Accordingly, in a Title VII case a plaintiff who succeeds in obtaining an injunction is entitled to attorneys fees unless there exist "very unusual circumstances."

B. The District Court Erred in Not Assessing Attorneys Fees Against MCA and JAC

1. The District Court Erred in Not Assessing Attorneys Fees Against the MCA

Here although plaintiffs prevailed as to each of the defendants and no "unusual circumstances" were found the District Court did not award fees against MCA and JAC.

Following the trial on the merits, after holding that MCA was a proper party to this case (A-616); the District Court issued an order enjoined MCA from further discrimination as follows:

> "MCA, its officers, agents, employees and successors, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color, or national origin. They shall not fail or refuse to hire for employment any individual on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin." (A-567).

This order was based upon numerous findings of the

District Court with respect to MCA's role in the steamfitting industry. Thus the District Court found that all present and past officers of MCA were white (A-589); that employers sought workers through MCA (A-592); and that while there was "no evidence that either Local 638 or MCA . . . engaged in purposeful discrimination. . ." in connection with work referral, the informal referral system and the history of discrimination in admission to the A Branch gave ". . . whites advantages in obtaining employment." (A-602-3). The Court also found that, although, in its view, no specific instances of MCA discrimination were shown,[4] MCA had greater influence over and responsibility for employment practices in the industry than any employer and that plaintiffs had shown an absence of non-white employment in the industry generally requiring a change in MCA referral practices (A-616).

On the basis of its findings, the court in its post-trial order not only enjoined MCA from further discrimination against any individual or class of individuals based on race, color or national origin (A-567), it also required MCA to

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4. The District Court's view notwithstanding, plaintiffs would point out that Eric Lewis, a fully qualified steamfitter, sought employment through MCA but was told he could not have a job unless he completed the apprenticeship program (A-290) found to be discriminatory by the district court (A-604). He was also told that he would probably not want to join the apprenticeship program as the wages would be too low for him (A-290; A-93).

maintain up-to-date records of available work (A-603); ordered MCA to submit an affirmative action program (A-569); ordered MCA and the Union to submit a proposed practical examination for admission to the A Branch (A-574); required all defendants, including MCA, to use their best efforts to provide apprentices with 1750 hours of work per year (A-575); and ordered MCA to use its best efforts to maintain an employment register (A-576). In its affirmative action program the Court further ordered MCA to refrain from causing those who applied for A Branch membership under its decree to suffer loss of employment or status as a consequence of failure to pass the practical examination established by the court (Doc. 73 p. 7), and required the Union and the "employers" to use their best efforts to place non-whites who failed that practical examination in training programs (Doc. 73 p. 9).

Obviously, plaintiffs were the prevailing party with respect to MCA and are entitled to attorneys fees.

2. The District Court Erred in Not Assessing Attorneys Fees Against the JAC

On the basis of its finding that the apprenticeship program administered by the JAC[5] violated Title VII (A-604),

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5. The apprenticeship program is operated by the JAC pursuant to a 1960 Declaration of Trust (A-589, 614). There are eight trustees under the Trust Agreement, four of whom are appointed by the Union and four of whom are appointed by MCA (A-589). The trustees have general authority to operate and set the standards for the apprenticeship program (A-434-36)
(footnote continued)

the District Court ordered that:

> "[The JAC], its officers, agents, employees, and successors, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. They shall receive and process applications for the apprenticeship program, admit apprentices, train, test, refer for employment, graduate and otherwise administer the apprenticeship program so as to ensure that no individual or class of individuals is excluded from equal work opportunities on the basis of race, color or national origin." (A-567-68).

To implement this injunction, pending achievement of the percentage goal of non-white Union members ordered by the District Court, the admission requirements for the apprenticeship program were significantly altered in that:

1) the length of the program was reduced from five to four years (A-570);

2) the size and frequency of the apprenticeship classes were to be determined by the Administrator, and at least 30% of those indentured

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and determine the need for apprentices (A-434). The trustees designated by MCA serve at the will of MCA, which can, at any time, terminate the designation of one of its trustees by a resolution of the MCA Board of Directors (A-433). Union trustees served for a term of three years at which time the Union would designate their successors (A-433). The provisions of the Trust could only be amended by a resolution approving such amendment adopted by the Union at a regular or special meeting and by a similar resolution of the MCA Board of Directors (A-1201). An assessment of attorneys fees against the JAC is one for which the MCA and Union are also liable. cf. Local 138, International Union of Operating Engineers v. NLRB, 321 F.2d 130 (2d Cir. 1963); Williams v. Sheet Metal Workers, Local 19, 5 E.P.D. ¶8595 (E.D. Pa. 1973).

in each year from 1974-1977 were to be non-white (A-570);

3) the age requirement was altered so that persons between the ages of 25 and 30 were no longer disqualified from the program (A-571);

4) the inquiry into an applicant's criminal record was limited and there was to be no inquiry into an applicant's arrest records (A-571);

5) a test validated in accordance with the EEOC guidelines was required (A-571);

6) a high school requirement was retained in the affirmative action program only so long as there was a sufficient number of non-white applicants possessing a high school diploma to meet the goal (Affirmative Action Plan, Doc. 73 p. 3).

In addition, appropriate publicity to inform non-whites of apprenticeship training opportunities was ordered (A-571). Finally, the District Court ordered that, during 1973, a minimum of 400 apprentices were to be indentured, of whom 175 had to be non-white (A-575).

In view of the extensive changes made by the District Court in the apprenticeship program and the injunctive relief ordered, it is clear that the relief obtained by plaintiffs entitles them to an award of attorneys fees against JAC. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

The District Court denied such an award on the grounds that the JAC was not found to have "purposefully discriminated" against members of the plaintiff class and that the JAC adopted the tests used in the apprenticeship program "in good faith upon the recommendation of experts" (A-1017). Both rationales conflict with the prior construction of Title VII in general and with the policy objectives of the attorneys fees provision of Title VII in particular.

The Supreme Court in Albemarle Paper Co. v. Moody, supra, decided shortly before the District Court's decision on attorneys fees, rejected the notion that a showing of purposeful discrimination is an element of a Title VII case:

> "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.' Griggs v. Duke Power Co., 401 U.S. at 432." 422 U.S. at 422-23.

A showing of purposeful discrimination is unnecessary for a finding that a defendant has violated Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796-97 (4th Cir.), appeal dismissed pursuant to Rule 60, 404 U.S. 1006 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969). And a finding of purposeful discrimination is not necessary to an award of back pay. Albemarle Paper Co. v. Moody, supra, 422 U.S. at 422-23; Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975); Trans

Union (UTU) Local 974 v. Norfolk Western Railway Co., ___ F.2d ___, 10 E.P.D. ¶10,398 p. 5727 (4th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364, 1377 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 877 (6th Cir. 1973). There is no basis for applying this additional criterion in determining whether an award of attorneys fees is appropriate, see, Rosenfeld v. Southern Pacific Co., 519 F.2d 527, 529-30 (9th Cir. 1975). Cf. Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1147 (1975) (Award of fees in Title II cases to those who serve as private attorneys general is not dependent on proof of bad faith.) If purposeful discrimination is unnecessary to a finding of a Title VII violation, then plaintiffs may be "prevailing parties" without showing purposeful discrimination and are therefore entitled to fee awards without such a showing. Limiting attorneys fees to instances of bad faith would severely curtail the effectiveness of the policy underlying the attorneys fee provision: to assist in the elimination of all discriminatory practices proscribed by the law.

In any event, JAC's claim to good faith is highly dubious.[6] It is not in dispute that the tests for admission to the apprenticeship program eliminated a greater percentage of black and Spanish-surnamed applicants than white applicants, and defendants were aware of this fact. The disparity between

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6. The data which demonstrated the disparate impact was provided by JAC itself in response to plaintiffs' interrogatories (JAC Answer to Plaintiffs' Interrogatories, Doc. 24, Appendix A, see, e.g., A-1204). The examination results for the years 1967 to the date of trial revealed that, among those tested, 41.37% of the whites, 10.37% of the blacks and 11.1% of the Spanish-surnamed persons achieved passing scores (A-620).

the pass/fail rate of non-whites and whites had a very high level of statistical significance.[7] The tests had not been validated (A-918), and were found by the district court not to have been properly job-related (A-607). In 1968 these tests had been the subject of a letter to the defendants by Dr. Jay Gottesman of defendants' testing agency, which pointed out their likely discriminatory impact and lack of validation (A-404). During the previous year Dr. Dennis Derryck, co-director of the Workers' Defense League, an organization established to increase non-white participation in the New York construction industry, had contacted the defendants on numerous occasions to point out the discriminatory impact of the apprenticeship tests, their lack of validation and the arbitrariness of the of the passing score (A-504-08). His efforts were unavailing (A-512-13). Moreover, even while this action was pending, "156 whites were admitted to the A Branch without taking either a written or a practical examination, . . ." (A-599). In light of the obvious results of the tests, the communications from concerned professionals and the application of a special admission standard for whites, it is inconceivable that the continued use of the apprenticeship admissions tests could be considered to have been in "goodfaith."

Finally, the Supreme Court has stated that an award of attorneys fees was intended

". . . not simply to penalize litigants who

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7. (A-256 [Trans. Testimony of Dr. Richard H. Barrett, plaintiffs' testing expert]).

> deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under [the statute.]" Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, (1968)

Denial of fees to a prevailing party under Title VII defeats this purpose.

C. Plaintiffs are Entitled to the Full Amount of the Attorneys Fees Earned in this Case

Over a period of more than five years plaintiffs' attorneys have devoted a total of 2,449.75 hours to representing the named plaintiffs and the members of the classes they represent (A-985). These hours were expended necessarily and, for the most part, successfully to achieve the desired result. One month after the filing of this case in the District Court, the plaintiffs obtained a preliminary injunction against the Union (A-105-06). Time consuming pre-trial discovery, requiring lengthy depositions and extensive litigation to compel the Union to answer to Interrogatories, yielded significant factual information which formed the basis of many of the findings of fact of the District Court (see, e.g., A-596 [Trial Opinion] and A-1194). (See infra p. 44-6, et seq. for a discussion of the relationship between this pre-trial discovery and the eventual findings of the district court.) Testimony at the trial by plaintiffs' witnesses also provided the basis for much of the District Court's opinion (see e.g., A-606-07, 622 [Trial Opinion] and A-253-59). After trial plaintiffs' attorneys submitted post-trial memoranda and findings of fact and conclusions of law, as required by the District Court. Plaintiffs' attorneys participated in a series of conferences with the District Court which preceded the issuance of its opinion, order and judgment

(see Transcripts of Conferences, Doc. 55, 58, 59, 70). Later they submitted a detailed proposed affirmative action plan as required by the Court and participated in additional conferences held by the Court to devise an acceptable plan (A-571). Before this Court plaintiffs argued an appeal taken by the Union from the District Court's post-trial order, opposed an attempt to intervene by the United States Chamber of Commerce, and argued an appeal from the denial of a motion to intervene by white non-members of the Union. Most of the testimony of the hearing on remand from this Court to determine the appropriate non-white membership goal was prepared and conducted by plaintiffs' attorneys (see Transcript of Hearing, Doc. 117). Finally, plaintiffs' attorneys are presently before this Court on another appeal, in which briefs on behalf of plaintiffs have already been filed, representing the plaintiff classes with respect to entitlement to back pay (A-781-82, 818-19).

For work performed through February 18, 1974 plaintiffs sought a fee of $128,092.50 in the District Court (A-985-86). This fee was documented extensively in two affidavits[8] filed by

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8. Plaintiffs' attorneys' second affidavit, dated February 18, 1975, increased the amount requested in certain categories but had the net effect of reducing requested fee by more than $4,000.00. Compare A-967 and A-985. The first affidavit had included fees earned in litigating the question of entitlement to attorneys fees; the second affidavit did not. Compare A-964-65 with A-969 et seq. The amounts earned in litigating the question of attorneys fees should also be paid. Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975).

plaintiffs' attorneys (A-959 et seq., 969 et seq.). The affidavits submitted, based upon time records maintained by plaintiffs' attorneys (A-969), set forth in detail the name of the attorney, the nature of the services rendered, the amount of time involved and the dates on which the services were rendered (A-969 et seq.). While the hourly rate requested for each attorney varied according to his or her experience the affidavits reveal that an average of $52.29 per hour was charged for the 2,449.75 hours devoted to the case. The fee recovered is to be paid to the National Employment Law Project, Inc. (the "Project") which employs plaintiffs' attorneys (A-1146).

The district court concluded that ". . .there is no reason to believe that [the Project's] services would not justify the full amount [of fees sought] if they were to be paid by a profit-making defendant." (A-1017) Declining to impose fees on two defendants (MCA and JAC) as to whom plaintiffs were also the "prevailing party" within the meaning of 42 U.S.C. §2000e-5(k), the court concluded that it would be "inequitable" to charge the remaining defendant, a "non-profit" union, with the full amount of plaintiffs' fees, in view of the Project's receipt of funds from sources other than court-awarded fees (A-1017). Whether or not the denial of fees as to the MCA and JAC was error, this conclusion as to the Union was erroneous for a number of reasons.

The magnitude of the change in the law of Title VII proposed by the District Court becomes apparent when its logical application to future cases is considered. Adopting the principle suggested by the District Court for Title VII cases, would mean that all labor unions because of their "non-profit" status would be accorded a partial exemption from the Title VII attorneys fees provision not available to other Title VII defendants, notwithstanding that unions are specifically identified as proper defendants under Title VII, see 42 U.S.C. §2000e(d). Decisions awarding attorneys fees against unions under Title VII have in no way suggested that the "non-profit" status of unions entitles them to such an exemption. See, Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.D.C. 1974); Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), petition for cert. pending, ___ U.S. ___, 44 U.S.L.W. 3037 (U.S. Feb. 24, 1975); Patterson v. American Tobacco Co., ___ F.Supp. ___, 9 E.P.D. ¶9909 (E.D. Va. 1974), aff'd in part, modified in part, and remanded on other grounds, ___ F.2d ___, 11 E.P.D. ¶10,278 (4th Cir. 1976); Sagers v. Yellow Freight Systems, Inc., ___ F.Supp. ___, 10 E.P.D. ¶10,131 (N.D. Ga. 1974). Indeed, Congress' intention to encourage vigorous enforcement of the Act through "private attorneys general" Albemarle Paper Co. v. Moody, supra, would be seriously undermined by a holding which denied compensation for services rendered because of the non-profit status of the defendant unions.

This is not a case in which plaintiffs' attorneys seek some fixed percentage of a large recovery as a contingent fee, as has often been the situation in securities and antitrust class action litigation. Cf. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974); Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). Both Grinnell and Lindy Brothers established that the most important element in calculating a fee is a determination of the number of hours worked and a reasonable hourly rate. See 495 F.2d 448, 491 and 487 F.2d 161, 166-67. Plaintiffs, following these guidelines have set forth the number of hours worked, the services performed and a very modest hourly fee schedule. The average hourly fee sought, $52.29 per hour, is most reasonable in light of awards made in other cases. See Trans World Airlines, Inc. v. Hughes, 312 F.Supp. 478, 484 (S.D.N.Y. 1970), aff'd 449 F.2d 51, 79 (2d Cir. 1971) rev'd on other grounds sub nom. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)(the district court stated that an average fee of $75 an hour was reasonable in New York City, though it decided to award a fee of $128 an hour); Moerman v. Sipco, Inc., 302 F.Supp. 439, 451 (S.D.N.Y. 1969), aff'd 422 F.2d 871 (2d Cir. 1970) ($66 an hour awarded); Blank v. Talley Industries, Inc., 390 F.Supp. 1 (S.D.N.Y. 1975) (hourly

rate for partners $100; for associates $50; attorneys recovered the hourly billing rate plus an additional 50% of the aggregate hourly fee). See also, Arenson v. Board of Trade of the City of Chicago, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974) (court decided average hourly rate of $358.56 was appropriate, i.e., four times regular hourly rate); Bray v. Safeway Stores, Inc., 392 F.Supp. 851 (N.D. Cal. 1975) ($400 an hour awarded).

Thus, since the district court had no reason to think the full amount was not justified, it erred in not awarding that amount unless the non-profit status of the Union or the receipt of funds from other sources by plaintiffs' attorneys' employer, the Project, justifies a reduction.

But the fact that the Union is a "non-profit" organization is inconsequential. In Grinnell, the leading case on attorneys fees in this Circuit, this Court, citing the district court decision in Trans World Airlines, Inc., supra, and other authority, set out a comprehensive list of the factors, other than the hours worked, to be considered in fixing a fee, 495 F.2d 448, 470-471, 473. There is no suggestion in Grinnell that the profit making status of the defendant should be considered. Consideration of that factor would be particularly inappropriate here. The "non-profit" defendant Union was able to retain, and presumably pay, highly competent counsel to contest this case vigorously. Now it should also pay the proven fee of the "prevailing party".

The mere fact that the fee might be paid from Union members' dues does nothing to alter the appropriateness of a full award. In the first place, there was no evidence that increased Union dues would result from payment of the full amount due. Even if an increase were to result, it is appropriate for Union members to bear a portion of the legal costs of this action: white Union members were the beneficiaries of the monopoly on steamfitting work they obtained as the result of the discriminatory practices corrected by the district court's injunction; non-white Union members are the direct beneficiaries of the effort involved in obtaining that injunction.

The fact that plaintiffs' attorneys are employed by an organization that receives funds from other sources is in no way relevant. Courts have frequently awarded fees to organizations that receive funding from grants and contracts and other sources not available to a law firm organized on traditional principles. See, infra p. 32. None of these cases has reduced an award because the organizations received such funds. And two Courts of Appeals have rejected the argument that there should be a denial or reduction of a fee because the recipient received funds from other sources. Tillman v. Wheaton-Haven Recreation Association, Inc., 517 F.2d 1141, 1148 (9th Cir. 1975); Thompson v. Madison County Board of Education, 496 F.2d 682, 689 (5th Cir. 1974); Fairley v.

Patterson, 493 F.2d 598 (5th Cir. 1974). If organizations demonstrate that they have devoted a specific amount of time to a case, they should be compensated in full for that time. Again, Grinnell does not suggest that the fact that attorneys receive funds from sources other than fee awards should be taken into consideration. Were this the case, the method of calculating fees would be drastically altered as most law firms are supported by fees paid by clients and not by fees awarded by courts.

If the true reason for reduction of the fee in this case is the alleged poverty of the Union, then the Court below itself suggested the solution. The Union is to pay out the fee actually awarded plaintiffs in three installments over a two year period. Surely the Union could pay the same amount over a longer period without seriously damaging its treasury. Moreover, another error by the district court, the failure to award any fee against MCA and JAC, once corrected, will alleviate the Union's burden in this regard, see supra pp. 12-20.

D. Plaintiffs Are Not Precluded From an Award of Attorneys Fees Because the National Employment Law Project, Inc. Is a Non-Profit Corporation Receiving Federal Funds

The Union contends that the circumstances of plaintiffs' representation in this action either preclude an award of attorneys fees under Title VII or render an award inappropriate. Those circumstances are the facts that plaintiffs are not obligated to pay any fee to their counsel, and that they are represented by attorneys employed by a non-profit organization which receives funds under grants from the Office of Economic Opportunity and contracts with the Equal Employment Opportunity Commission, as well as from private sources. From this the Union contends that plaintiffs are either (A) legally precluded from an award by the provision of 42 U.S.C. §2000e-5(k) restricting awards to the "prevailing party, other than the Commission or the United States" (Appellant's Brief at 8-12); or (B) that an award is inappropriate to accomplish the purpose of the statutory provision (Appellant's Brief at 12-16). The supporting arguments for both contentions are in large part identical, although much of what is urged by the Union in support of point A appears more logically related to Point B.

Plaintiffs' attorneys are employed by the National Employment Law Project, Inc., a not-for-profit corporation organized under the laws of the State of New York, and approved

to engage in the practice of law by an order of the Appellate Division, First Department. That order permits the Project to receive funds from public and private sources and to request and receive judicial awards of attorneys fees to carry out the program of legal services in which it is engaged. Prior to its incorporation, the Project was engaged in the same program, but as an unincorporated affiliate of the Council of New York Law Associates' Charitable Trust (A-1013). The Project's clients do not pay fees to the Project and court awards provide its only source of fees (A-950). While the sources and relative proportions of operating income may vary from year to year (as, indeed, may their availability), in the past the Project has received the bulk of its funds under federal grants and contracts (A-760).

1. An Award of Fees Accords With the Statutory Purpose of Title VII

In support of its contentions the Union argues that an award to plaintiffs, who pay no fee because they are represented by a non-profit organization which receives public funds, would not serve the statutory purpose of 42 U.S.C. §2000e-5(k), that this is a "special circumstance" which renders the award unjust (Appellant's Brief at 10), and that the plaintiffs' attorneys are salaried and incur no personal financial risk meriting an award (Appellant's Brief at 11, 14).

The fact that plaintiffs pay no fees is irrelevant to

a statutory award of fees. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1147 (4th Cir. 1975); Clark v. American Marine Corporation, 320 F.Supp. 709 (E.D.La. 1970), aff'd, 347 F.2d 959 (5th Cir. 1971).

As to the Project's receipt of public funds, the error of the Union's argument was aptly noted by the Court of Appeals for the Sixth Circuit in Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974):

> "The fact that Appellees' counsel was a legal services organization, partially supported by public funds, is irrelevant in determining whether an award is proper. Legal services organizations do not have unlimited resources to devote to the public interest and must confine their representation of indigents to the boundaries of their budgets. An attorney fees' award serves its purpose--to prevent worthy claimants from being silenced or stifled because of a lack of legal resources--whether it goes to private or "public" counsel. Brandenburger v. Thompson. 494 F.2d 885 (9th Cir. 1974); Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974); Wilderness Society v. Morton, 495 F.2d 1026 (D.C.Cir. 1974) (en banc), cert. granted, ___ U.S. ___, 95 S.Ct. 39, 42 L.Ed. 2d 47 (Oct. 15, 1974); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971)." (Footnotes omitted)

This Court has implicitly approved this approach by affirming an award of attorneys fees to a legal services office. Class v. Norton, 376 F.Supp. 496, 502-503 (D.Conn.), aff'd in part, rev'd in part, 505 F.2d 123 (2d Cir. 1974). This Court in another context explicitly rejected as "unimpressive" the argument that an award of attorneys fees was improper because the plaintiffs were represented by a non-profit organization. Jordan v. Fusari, 496 F.2d 646, 649 (2d Cir. 1974).

This Court's reaction to the argument was correct. The propriety of such awards to plaintiffs represented by non-profit organizations such as the Project is well accepted, and the instances are numerous. E.g., Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Thompson v. Madison County Board of Education, 496 F.2d 682 (5th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970). They include many awards to plaintiffs represented by organizations which, like the Project, receive federal funds. E.g., Incarcerated Men of Allen County Jail v. Fair, supra; Palmer v. Columbia Gas of Ohio, Inc., 375 F.Supp. 634 (N.D.Ohio 1974); Jones v. Seldon's Furniture Warehouse, 357 F.Supp. 886 (E.D.Va. 1973); Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357 (D.Kan. 1971); see also, Townsend v. Edelman, 518 F.2d 116, 122-123 (7th Cir. 1975) (award of fees to legal services attorneys approved in principle); Hoitt v. Vitek, 495 F.2d 219, 221 (1st Cir. 1974) (". . . we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys fees to [New Hampshire Legal Assistance]").[9]

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9. To rebut this authority, the Union cites three cases as having denied fees to the Project, but each of these cases is inapposite. In Woodfolk v. Brown, 358 F.Supp. 524 (E.D.Va. 1973) the court favorably cited its own earlier decision awarding a fee, under a statute that provided for attorneys fees,
(footnote continued)

The courts have also specifically considered and approved awards to non-profit organizations under Title VII of the Civil Rights Act of 1964; e.g., Clark v. American Marine Corp., 347 F.2d 959 (5th Cir. 1971) aff'g on opinion below at 320 F.Supp. 709 (E.D.La. 1970); Davis v. County of Los Angeles, ___ F.Supp. ___, 8 E.P.D. ¶9444 (C.D.Cal. 1974); see Lea v. Cone Mills, 438 F.2d 86 (4th Cir. 1971); Doe v. Osteopathic Hospital of Wichita, Inc., supra; as well

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(footnote continued from preceding page)
to the very O.E.O. legal services office that, as the Project's co-counsel, was denied fees in Woolfolk. 358 F.Supp. 524, 537 citing Jones v. Seldons Furniture Warehouse, 357 F.Supp. 886 (E.D.Va. 1973). Thus the Court did not rule that offices funded with federal funds should not recover fees. In Dublino v. New York Department of Social Servic s, 348 F.Supp. 290, rev'd 413 U.S. 405 (1973), the action was brought under the United States Constitution and the Social Security Act (42 U.S.C. §§301, et seq.) which, of course, contain no specific provisions for attorneys fees incurred in federal court litigation. Plaintiffs' first request for fees was denied without opinion (A-767). The Supreme Court reversed on the merits the decision in favor of the Project's clients while plaintiffs' second motion for attorneys fees was pending in the District Court, thereby mooting plaintiffs' motion. In Sims v. Sheet Metal Workers Local 65, 353 F.Supp. 22 (N.D.Ohio 1972), remanded, 489 F.2d 1023 (6th Cir. 1973), the District Court denied an award of fees for unspecified reasons and the Circuit Court remanded for consideration of attorneys fees. See 489 F.2d at 1028.

The Union also seeks solace from Gaddis v. Wyman, 336 F. Supp. 1225 (S.D.N.Y. 1972), an earlier decision of Judge Bonsal which the Union quotes in support of its argument that public policy is not served by an award of fees to a legal services office (Appellant's Brief at 13). The Union neglected to include in the quote the sentence immediately preceding it: "There is no statutory basis for awarding attorneys' fees in proceedings against public officials." 336 F.Supp. at 1227. There being no special circumstances, attorneys fees were denied. In the present case there is, of course, a statutory basis, requiring attorneys fees in all but "very unusual circumstances." Nothing in the Gaddis decision, and certainly nothing in the decision below suggests that this distinction was lost on Judge Bonsal.

as under the similar provision of Title II of the Act, with which the Title VII provision was equated in Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); e.g., Tillman v. Wheaton-Haven Recreation Ass'n, Inc., supra, 517 F.2d at 1147-48.

Each of these awards evidences a recognition of the fact that where attorneys fees are authorized, in Title VII actions as in others, the policy underlying the authorization is advanced by the award of fees to non-profit organizations, regardless of their funding sources, to the same if not greater extent as awards to paid counsel. As this case adequately demonstrates, significant Title VII cases are large, time-consuming and expensive, requiring extensive discovery and depositions, expert consultants and witnesses, mastery of complex and often quite technical questions of law and fact, and lengthy trials. Those whom the Act was designed to protect are never in a position to advance such costs. Undertaking representation in such cases requires a commitment of resources, on a contingent basis, that only the larger of conventional law firms are in a position to make without assistance. For these reasons organizations like the Project, however funded, have borne the burden of the first ten years of litigation under Title VII. See Cooper, Introduction: Equal Employment Law Today, 5 Colum. Human Rights L. Rev. 263, 266 and fn. 26 (1973). And no doubt will continue to bear the burden of private enforcement for some time.

In discussing the applicability of the rationale of Newman v. Piggie Park Enterprises to a non-profit organization under the equivalent attorneys fees provision of Title II of the Civil Rights Act, the Fourth Circuit observed in Tillman v. Wheaton-Haven Recreation Ass'n, Inc., supra:

> "An award that ultimately is donated to a civil rights organization that opposes such discrimination can do much to further this goal. Litigation to secure the full measure of the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Acts. Consequently, when an allowance of attorneys fees is justified, it should be measured by the reasonable value of the lawyer's services . . ." 517 F.2d at 1148.

In addition to enabling the organization to continue and expand its services, awarding attorneys fees to organizations like the Project, measured by the actual value of the lawyers' services, has a second implication for the public interest in achieving wide enforcement through private litigation and eliminating the practices proscribed by the law. Unless awards are based on the generally accepted standards of the reasonable value of the lawyers' services, reasonably comparable to the fees expected and awarded in commercial litigation requiring similar effort, there is little likelihood that conventional firms with the resources to undertake these cases will do so, or that the ultimate purpose of the attorneys fees provisions will be realized.

The Union argues that the fact that plaintiffs pay no fee and the Project receives funds from O.E.O. and the E.E.O.C. amounts to "the type of 'special circumstances' which

would render an award herein unjust." (Appellant's Brief at 10). In the common sense of the term, of course, there is little to suggest why imposing on the violator of the law the costs expended in securing judicial relief from the transgressions, whatever resources were used to meet those costs, is "unjust." Moreover, while the bulk of the Project's funds heretofore have been secured from public sources, the Project is in no sense a governmental agency and could be as seriously restricted in its ability to continue Title VII representation as any other organization if fees are unavailable to it. As the Court in Palmer v. Columbia Gas of Ohio, Inc., 375 F.Supp. 634, 636 (N.D.Ohio 1974) found:

> "Furthermore, the Court takes notice of the fact that continued public funding for legal services to the poor is subject to the vagaries of the political decision making process. We cannot presume that such funding will continue in the future. The decision to award attorney fees should not stand upon the status of the party awarded the fees. When granting fees to a private practitioner, the Court does not inquire into the amount, or source of his income. A blanket exclusion of legal services organizations from receipt of such fees would be inconsistent with the right of the poor to access to the courts. Those seeking to vindicate their constitutional rights should not be forced to rely upon the political vagaries of governmental benevolence or private philanthropy. See La Raza Unida v. Volpe, 57 F.R.D. 94, 98 n. 6 (N.D.Cal. 1972)."

It is the purpose of the attorneys fees provision of Title VII to assure the availability of legal representation to vindicate the important private and national interests in the elimination of the discriminatory practices in which the

Unions and other defendants have traditionally engaged. An award of reasonable attorneys fees to plaintiffs herein for the legal action that has been necessary to restrain the practices of the defendants will advance this purpose in this case and others.

2. Plaintiffs Are Not Precluded From An Award of Attorneys Fees By the Language of 42 U.S.C. §2000e-5(k) of Title VII

From the provision of 42 U.S.C. §2000e-5(k), which allows attorneys fees to the "prevailing party, other than the Commission or the United States," the Union argues that plaintiffs are precluded from an award because the Project received funds under grants from the Office of Economic Opportunity and contracts with the Equal Employment Opportunity Commission and is thus the "Commission" or the "United States" within the meaning of the statute.

This argument disregards the plain language of the statute, which authorizes fees to the prevailing "party, other than the Commission or the United States." (Emphasis supplied) No argument can obscure the plain language of the provision, or the fact that the prevailing "parties" here are the private litigants George Rios, et al. And, in fact, the Union articulates no such argument but merely asserts, without authority or factual premise, that the bare fact of receipt of government funds by the Project somehow converts these litigants into the Commission or the United States.

The E.E.O.C. is an entity completely separate from the Project. Project attorneys do not work for the E.E.O.C., and do not represent it in litigation. As the District Court correctly found, findings not challenged by the Union, "[t]he Project attorneys are not government employees, do not enjoy the protections of the civil service laws or of legislatively mandated salaries, and do not represent the government in litigation." (A-1015). In fact, in this very case, when the E.E.O.C. secured the power to litigate in its own right under the 1972 amendments to Title VII (Pub. L. 92-261 88 Stat. 103), 42 U.S.C. §2000e-5(f)(1), it was substituted for the United States in the District Court (Doc. 74). The United States Attorney (and not the Project) now represents the E.E.O.C. in this action. The mere fact that the E.E.O.C. enters a contract with the Project to encourage private enforcement of Title VII does not convert the Project or its clients into the E.E.O.C. The E.E.O.C. is a prevailing party in the companion case in this litigation; it is not entitled to attorneys fees. The plaintiffs, George Rios, et al., are also prevailing parties; they are entitled to attorneys fees under 42 U.S.C. §2000e-5(k).

Private legal services organizations throughout the country received funds first under grants from the Office of Economic Opportunity and now from the Legal Services Corporation established by the Legal Services Corporation Act of 1974, 42 U.S.C. §2996, et seq. The Union's contention with respect to the Project's legal services funds would logically render all such

organizations subject not only to the limitation on the "United States" in §2000e-5(k) of Title VII, but also to the general restriction on awards of attorneys fees in civil actions brought by the United States provided in 28 U.S.C. §2412. Although, not surprisingly, the Union's contention may not have been made, or discussed, other cases reveal repeated instances of judicial action contrary to the Union's contention. Thus, although 28 U.S.C. §2412 contains a general restriction on awards of attorneys fees in favor of the United States unless otherwise specifically provided by statute, numerous courts have awarded attorneys fees to federally funded legal services attorneys in the absence of any such statutory authorization. E.g., Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) (attorneys fees awarded on court's equitable, non-statutory authority); Class v. Norton, 376 F.Supp. 496, 502-503 (D. Conn.) aff'd in part, rev'd in part, 505 F.2d 123 (2d Cir. 1974) (fees awarded on equitable, non-statutory authority); Palmer v. Columbia Gas of Ohio, Inc., 375 F.Supp. 634 (N.D. Ohio 1974) (fees awarded on equitable, non-statutory authority); Jones v. Seldon's Furniture Warehouse, 357 F.Supp. 886 (E.D.Va. 1973) [fees awarded under Truth in Lending Act provision, 15 U.S.C. §1640(a)(3)]; Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357 (D.Kan. 1971) (fees awarded under Title VII). See also Townsend v. Edelman, 518 F.2d 116, 122-123 (7th Cir. 1975) (authority to award fees to legal services attorneys approved in principle); Hoitt v. Vitek, 495 F.2d 219, 221

(1st Cir. 1974) (". . . we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to [New Hampshire Legal Assistance]").

Indeed, the Supreme Court recently took note of the capacity of federally funded legal services organizations to receive attorneys fees. In Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), the Court observed that in Congress' enactment of the recent Legal Services Corporation Act of 1974, 42 U.S.C. §2996, et seq.,[11] establishing the successor to the legal services component of the Office of Economic Opportunity:

> "there was no attempt to restrict the plaintiffs recovery of attorneys' fees in actions commenced by the Corporation or its recipient where under the circumstances other plaintiffs would be awarded such fees. . . . Thus, if other plaintiffs might recover on the private attorneys general theory, so might the Corporation." (Citations omitted) 421 U.S. at 240, n.36

The Union's contention is plainly without merit.

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11. Pub. L. 93-355, 88 Stat. 378 (July 25, 1974).

E. The District Court's Award of Attorneys Fees to the Plaintiffs Was Not Excessive

The Union argues that the fee awarded was excessive, in that after this case was consolidated for purposes of trial with the case brought by the United States, the efforts of the Project were largely parallel to and duplicative of those of the Assistant United States Attorneys (Appellant's Brief at 17-18). In point of fact, the activities of the United States Attorney and plaintiffs' attorneys were closely coordinated to insure the maximum efficient utilization of the limited resources of both offices in handling this extraordinarily complex litigation.[12] In any event the plaintiffs' attorneys had a duty, imposed by ethical considerations and the District Court's class action order,[13] to represent the individuals and the classes to the best of their ability.

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12. Had the case been tried solely by attorneys for the private plaintiffs, the additional time and effort required would, of course, have resulted in a much higher fee request.

13. That order defined the classes to be represented by plaintiffs' attorneys as follows:

> (a) All Negro and Spanish Sur-named Americans residing in New York City and the Counties of Nassau and Suffolk in the State of New York who now or at any time in the future have the skills necessary to work as journeymen steamfitters; and

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This Circuit has held that private plaintiffs must be allowed to proceed with their action notwithstanding the settlement of an action by the United States. Williamson v. Bethlehem Steel Co., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973).

The separate interests represented by private litigants and the government have been recognized by courts which have held that attorneys fees for private litigants are clearly appropriate in consolidated actions in which both the government and private litigants pursue Title VII remedies. See, e.g., Patterson v. American Tobacco Co., ___ F.Supp. ___, 9 E.P.D. ¶9909, ___ F.Supp. ___, 9 E.P.D. ¶10,039 (E.D. Va. 1975), aff'd in part, modified in part and remanded on other grounds, ___ F.2d ___, 11 E.P.D. ¶10,278 (4th Cir. 1976) (private plaintiffs awarded an interim attorneys fee of $125,000 in a case consolidated for

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continued from preceding page

> (b) All Negro and Spanish Sur-named Americans residing in New York City and the Counties of Nassau and Suffolk in the State of New York who now or at any time in the future are capable of learning such skills and who wish to obtain access to steamfitting work in New York City and said Counties.

trial with a related action brought by the EEOC); United States v. Operating Engineers, Local Union 3, 6 E.P.D. ¶8946 (N.D. Cal. 1973) ($40,000 in fees awarded to attorneys for private plaintiffs monitoring the performance of the government attorneys who had assumed primary responsibility for prosecuting the consolidated cases after intervening in the private action). The court in Local Union 3, supra, in elucidating the reasons for its award, noted:

> "The purpose of the statute was fulfilled by the initiating of this lawsuit, and this the plaintiff himself did. The fact that the government later decided to file its own suit does not mitigate the salutary effects of a plaintiff's determining to vindicate his rights under the statute; denying reasonable attorney's fees because of the government's participation might well discourage filings by like-minded plaintiffs, however." 6 E.P.D. ¶8946 at 6035.

Moreover, unlike the private plaintiffs in the Local Union 3 case, the Rios attorneys have not merely "monitored" this action but have actively prosecuted it for a period of over five years. Those attorneys spent a total of 2,449.75 hours in representing their clients (A-985).

Long prior to the filing of the United States action, the Rios attorneys were engaged in proceedings before the New

York State Division of Human Rights which resulted in three findings of "probable cause" by that agency (A-57-59). Later, and three months prior to the filing of the United States action, this action was filed. One month later the Rios attorneys obtained a preliminary injunction from Judge Marvin E. Frankel (A-105-06), the opinion in support of which was later cited by Judge Bonsal in support of a preliminary injunction issued in the United States case. 337 F.Supp. 217, 220. Extensive preparation, including the taking of an early deposition, was necessary for the Rios injunction proceeding. Still prior to the filing of the United States case on April 18, 1971, the Rios attorneys served each of the defendants with interrogatories.

While it is not possible to determine which briefs and which arguments at judicial conferences were ultimately persuasive, a significant number of the eventual findings of the district court were based on answers to interrogatories propounded by attorneys for the private plaintiffs.[14] In

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14. See: e.g., Finding Number 5 (re size and racial composition of A Branch membership) is based upon Union Answers to Rios Interrogatories, Answer 3(A)(2) and Union Further Answers to Interrogatories (10/1/71), Answer 3(A)(1) (A-586-87; 1194-97).

Finding Number 6 (re size of B Branch membership) is based upon Union Answers to Rios Interrogatories 3 (B)(1) and Union Further Answers to Rios Interrogatories (10/1/71), Answer 3 (B)(1)(a) (A-587, 1195, 1197).

Finding Number 11 (re Steamfitters Industry Educational Fund) is based upon JAC Answers to Rios First Interrogatories, Answer 2(G), and MCA Answers to Rios Interrogatories, Exhibit 24 (A-589, 432-41). (Footnote continued)

addition, numerous of the court's findings came as the result of information in the depositions taken by the Rios attorneys.[15]

Finding Number 12 (re race of officers and agents of defendants) is based upon MCA Answers to Rios Interrogatories, Answer 2B, and Union Answers to Rios Interrogatories, Answer 2B (A-589, 1192, 1199).

Finding Number 13 (re number of non-white Union members) is based upon Union Answers to Rios Interrogatories, Answer 3(A)(3) (A-589, 1194).

Finding Number 17 (re overtime) is based upon Union Further Answers to Interrogatories (11/72), Answer 3 (A)(12), Appendices "A" and "B" (i.e., computer study) (A-591, 1198).

Finding Number 24 (re number of journeymen who completed apprenticeship) is largely based upon Union Answers to Rios Interrogatories, Answer 3(A)(7) and (8) (A-593, 1194).

Finding Number 27 (re pass-fail rate of black and white apprenticeship applicants) is based on JAC Answers to Rios Interrogatories, Appendix A (A-594, Doc. 24).

Finding Number 28 (re contents of application for apprenticeship) is based upon JAC Answers to Rios Interrogatories, Answers 2(H), 4(A), Exhibits 14 and 15 (A-595, 921-35, 1202, 1205).

Findings Numbers 31, 32 and 33 (re number of whites and non-whites in apprenticeship) are largely based upon Union Answers to Rios Interrogatories, Answers 3(A)(2), (5) and (6), and Union Further Answers to Rios Interrogatories (10/1/71), Answers 3(A)(2), Exhibits A and P (A-596-97, 1194, 1196, Doc. 34).

Finding Number 38 (re date first non-whites admitted to A Branch and fact that five non-whites entered Union through apprenticeship) is based upon Union Answers to Rios Interrogatories, Answer 3(A)(3) and (4) and Union Further Answers to Rios Interrogatories (10/1/71), Exhibits A and B (A-598, 1194, Doc.34)

Finding Number ' (re family relationships among at least 11% of the A Branch members of the Union) is based on Union Further Answers to Rios Requests for Admissions (A-867-77).

15.As to Findings Number 14 and 15 [re membership application procedures], see Deposition of Tracey at 24 et seq. Ex. 153; as to (footnote continued)

Likewise, testimony at the trial by witnesses examined by the Rios attorneys provided the basis for much of the court's opinion (e.g., it was the Rios plaintiffs' testing expert, Dr. Barrett, who provided the Court with the testimony on which it could base its conclusions concerning defendants' tests [A-254-59,606]). The Court noted the existence of the racially disparate ratios of apprentice "drop-outs" in requiring a reduction in the length of the apprenticeship program, evidence provided by the Rios plaintiffs' statistical expert, Dr. Bickel (A-612, 683-87). All of the non-white witnesses who had experience with attempting to enter or participate in the apprenticeship program were examined by the Rios attorneys (A-231, 284, 861-62). Similarly, much of the testimony concerning the facility with which steamfitting can be taught and learned was provided by Rios witnesses (see, e.g., Jenkins testimony and Friend testimony)(A-660-65; Transcript of Trial at 702-09, Doc. 68D).

Following the trial and the development of the Affirmative Action Plan, the Rios attorneys have continued to vigorously represent the interests of the plaintiffs in the five appeals that have been taken and the remand proceedings. See supra p. 21-22. The District Court, in the best position to

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Findings Numbers 20 and 21 [re referral to jobs], see Deposition of Tracey at 82 et seq. and Deposition of Murray at 44-46, Ex. 152; as to Findings Numbers 25-28, [re apprenticeship requirements] see Deposition of Kerr at 31-39, 45-46, 64-70, 73-75, 77, 140-165, Ex. 160.

assess whether the efforts of the Rios attorneys were duplicative, determined that the services rendered would have justified the full amount of fees if they were to be paid by a profit-making defendant (A-1017). Under all of these circumstances the Union's contention that the efforts of the Rios attorneys were duplicative is clearly without merit and should be dismissed by this Court.

Finally, the Union claims that its limited funds could better be used to implement the District Court's orders than to pay the attorneys' fees awarded to plaintiffs (Appellant's Brief at 19). Certainly, Congress in enacting Title VII did not intend that one form of relief should be denied because another form of relief is granted. Injunctive relief, including reinstatement, back pay and attorneys' fees, are all means by which practices of racial discrimination may be attacked, and eliminated. It is no defense to one of these means of enforcement that a defendant must comply with another.

F. The District Court Did Not Abuse Its Discretion In Awarding Costs and Disbursements To The Rios Plaintiffs

The Union challenges the plaintiffs' right to recover certain out-of-pocket expenses incurred in the course of this lawsuit including witness fees and travel expenses, attorney travel expenses, subway fares and copying costs. This challenge is based upon confusion concerning the distinction between permissable cost, travel and witness fee awards under Title 28 of the United States Code and out-of-pocket expenses appropriately awarded in connection with an award of attorneys fees. While it is true that many of the items (e.g. transcript costs and travel by witnesses) could be awarded at least in part pursuant to 28 U.S.C. §§1821 and 1920 an award of the full amount of these items is also required by the provision of Title VII allowing recovery of costs and attorneys fees, 42 U.S.C. §2000e-5(k).

Thus expert witness fees incurred by the plaintiffs in the course of this litigation are recoverable. Such fees have been routinely awarded in connection with awards of attorneys fees, particularly in civil rights actions in which expert testimony is a necessary and indispensible item of proof. See Bradley v. School Board of City of Richmond, 53 F.R.D. 28 (E.D. Va. 1971), rev'd 472 F.2d 318 (4th Cir. 1972) (en banc), fee award upheld, 416 U.S. 696 (1974); Davis v. County of Los Angeles, ___ F.Supp.

___, 8 E.P.D. ¶9444 at 5048 (C.D. Cal. 1974); La Raza Unida v. Volpe, 57 F.R.D. 94, 102 (N.D. Cal. 1972). Defendants' attempt to exclude the expert witness fee because it is not expressly allowed in 28 U.S.C. §1821 is erroneous because such fees are deemed recoverable not as costs per se, but rather as actual expenses of the litigation in cases in which attorneys fees are awarded. See Bradley v. School Board of City of Richmond, supra at 43-44.

For the same reason, plaintiffs' attorneys' travel expenses, travel by witnesses, copying costs and other miscellaneous expenditures are recoverable as expenses necessary to the conduct of the lawsuit. See, e.g., Bradley v. School Board of the City of Richmond, supra (attorney travel expenses, office supplies, investigation assistance, and transcript costs awarded); Davis v. County of Los Angeles, supra (award includes "disbursements"); United States v. United States Steel Corp., ___ F.Supp. ___, 6 E.P.D. ¶8790 (N.D. Ala. 1973) (attorneys' fees award includes "reimbursement of expenses"); James v. Beaufort County Board of Education, 348 F.Supp. 711 (E.D.N.C. 1971), aff'd, 472 F.2d 177 (4th Cir. 1972) (en banc) (award of "out of pocket expenses").

Finally, the district court properly exercised its discretion in awarding to plaintiffs the full costs of the

transcripts, copies of which were necessarily obtained both by the Rios attorneys and the United States Attorney for use in the case. The cost of the transcripts is a proper cost within the meaning of 42 U.S.C. §2000e-5(k). In addition, it is elementary that the cost of transcripts may be taxed by the district court. 28 U.S.C. §1920(2). It would have been impossible for plaintiffs' attorneys to adequately represent the interests of the classes at trial, during the writing of the post-trial briefs, and thereafter had the transcripts not been readily available in their own offices. No doubt the Union attorneys found their copy essential to the conduct of the Union's defense notwithstanding that the MCA attorneys had purchased a copy. That attorneys for the plaintiff United States had equal need for the transcripts is obvious and should in no way reduce the obligation of the Union to pay for the costs of a suit in which plaintiffs have prevailed.

The Union's final suggestion that the district court abused its discretion in not apportioning costs among all the parties ignores the Court's familiarity with the long history of this action. In any event, if costs are to be apportioned it should be among the three defendants whose discrimination the District Court enjoined.

V. CONCLUSION

For the foregoing reasons, the District Court's order should be reversed insofar as it declined to award fees against MCA and JAC and awarded fees in an amount less than that requested. In all other respects that award should be affirmed.

Dated: New York, New York
April 2, 1976

Respectfully submitted,

MARILYN R. WALTER
ROBERT P. ROBERTS
National Employment Law Project, Inc.
423 West 118th Street
New York, New York 10027
(212) 866-8591

TUFO, JOHNSTON & ALLEGAERT
DENNIS R. YEAGER, Of Counsel
645 Madison Avenue
New York, New York 10022
(212) 752-8668

By: Marilyn R. Walter
MARILYN R. WALTER

Attorneys for Plaintiffs-Appellees-Appellants, George Rios, et al.

CERTIFICATE OF SERVICE

The foregoing Brief of Plaintiffs-Appellees-Appellants, George Rios, et al., was served upon:

Breed, Abbott & Morgan
1 Chase Manhattan Plaza
New York, New York 10005

Delson & Gordon
230 Park Avenue
New York, New York 10017

Robert B. Fiske, Esq.
United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

by mailing two true copies of same, United States mail, postage prepaid on this 2nd day of April, 1976.

Marilyn K Walter

Attorney for Plaintiffs-Appellees
Appellants George Rios, et al.